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No. 07-816

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113, WASHINGTON, D.C. 20515

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Grand Jury Investigation into Possible Violations of Title 18, U.S.C., In re, 587 F.2d 589 (3d Cir. 1978) 4

Gravel v. *United States*, 408 U.S. 606 (1972) 10

United States v. *Brewster*, 408 U.S. 501 (1972) 3, 11

United States v. *Gillock*, 445 U.S. 360 (1980) 11

United States v. *Nixon*, 418 U.S. 683 (1974) 11

United States v. *Williams*, 504 U.S. 36 (1992) 6

Constitution and rules:

U.S. Const.:

Art. 1, § 6, Cl. 1 (Speech or Debate Clause) .... *passim*

Amend IV 10

Fed R. Crim. P. 6(e) 10

Sup. Ct. R. 10(a) 4

Miscellaneous:

Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington (Feb. 13, 2008) <http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf> 9

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The divided court of appeals in this case established an absolute rule against compelled disclosure of Speech or Debate material to the Executive Branch in connection with an ongoing criminal investigation. Representative Jefferson and his amici float some procedural objections to this Court's review but primarily argue that the decision below is correct on the merits. Those contentions are wrong. And most importantly, they do nothing to diminish the urgent need for this Court's guidance. The court of appeals' erroneous and expansive construction of the Speech or Debate Clause is jeopardizing ongoing public corruption investigations by forcing prosecutors to forgo evidence or risk a determination that their investigations were tainted by the use of previously uncontroversial investigative techniques. This Court should grant review to settle the exceptionally important constitutional issues presented and to promote

public confidence in the effective, and timely, enforcement of public corruption laws.

1. a. This case presents a question of extraordinary importance: Whether the Speech or Debate Clause provides a non-disclosure privilege that bars Executive Branch law enforcement agents from executing a search warrant in a Member's office. While Representative Jefferson insists (Br. in Opp. 29-30) that searches would be practical under the court of appeals' decision, he makes no serious effort to refute the detailed showing to the contrary in the petition for a writ of certiorari. As the petition explains (Pet. 19), the court of appeals' decision precludes any Executive Branch law enforcement agents from conducting even a cursory review of documents until after Members have engaged in an ex ante screening of the materials and the courts have determined, in camera and ex parte, that the documents are not privileged. Excluding law enforcement agents from a search directly jeopardizes its law enforcement purpose. Pet. 19-21.

Moreover, requiring courts to review documents for privilege before law enforcement agents could even screen the documents for relevance would produce potentially lengthy delays that would seriously hamper criminal investigations while statutes of limitations were running. Pet. 21-23. In the midst of a criminal investigation, timely access to seized evidence is critical, particularly when the subject of the investigation knows what was searched. Here, the district court has not announced any privilege determinations more than a year and a half after the court of appeals issued its remand order directing the court to do so. The bottom line is that, if the government cannot search a Member's office in the manner authorized by the search warrant here—which included numerous safeguards for the Member's benefit, see Pet. 4-5—the government cannot do

so in any meaningful manner and congressional offices may become "a sanctuary for crime." *United States* v. *Brewster*, 408 U.S. 501, 521 (1972) (citation omitted).

b. Searches of congressional offices are admittedly rare, but because the court of appeals' decision in this case effectively renders congressional offices immune from searches in public corruption probes, it could have a significant impact on criminal behavior on a prospective basis. Moreover, the practical consequences of the court of appeals' decision sweep far beyond office searches. Pet. 23-26. As Representative Jefferson argues (Br. in Opp. 31), the court of appeals' holding applies to the search of any "location where legislative materials were inevitably to be found." Pet. App. 15a; see Pet. 24. The court of appeals' decision therefore chills the use of other vital investigative techniques such as searches of Members' residences, cars, briefcases, and home-district offices, as well as wiretaps, pen registers, and staffer interviews. Pet. 24-25.

While Representative Jefferson denigrates those concerns (Br. in Opp. 31-32), they are real. For example, the government does not presently intend to use wiretaps directed at Members in the District of Columbia—the location where relevant communications are most likely to occur. Pet. 25. Representative Jefferson's response (Br. in Opp. 31-32) that minimization techniques must be used in any event misses the point. Minimization techniques are used to identify non-responsive or privileged communications and to cease surveillance as soon as the communications are identified as being non-responsive or privileged. As the petition explains (Pet. 25), however, even with the use of such techniques, officers typically hear privileged communications before determining that the relevant conversation (or portion of the conversation) is privileged. By replacing traditional mitigation techniques with an absolute

confidentiality privilege, the court of appeals' decision jeopardizes vital, previously uncontroversial investigative techniques.

Representative Jefferson misapprehends (*e.g.*, Br. in Opp. 1, 12) this Court's certiorari criteria in repeatedly arguing that the government's concern with the full consequences of the court of appeals' decision shows that the government is seeking a mere advisory opinion. As discussed below, the petition seeks review of the court of appeals' judgment, and reversal of the court of appeals' decision would have important practical consequences with respect to this very search and the ongoing criminal investigation that led to the search. The fact that the court of appeals' decision also jeopardizes other vital investigative techniques does not suggest that the government seeks a mere advisory opinion; instead, it confirms that the petition presents "an important federal question," Sup. Ct. R. 10(a), that warrants this Court's review.

c. While Representative Jefferson argues (Br. in Opp. 33-34) that this case does not implicate a square circuit split, the court of appeals' decision is in significant tension with the Third Circuit's holding that "the privilege when applied to records or third-party testimony is one of non-evidentiary use, not of non-disclosure." *In re Grand Jury Investigation into Possible Violations of Title 18, U.S.C.*, 587 F.2d 589, 597 (1978) (*Eilberg*). See Pet. 26-28. Indeed, Representative Jefferson acknowledges (Br. in Opp. 33) that "*Eilberg* rejected the Speech or Debate non-disclosure privilege that was relied on by the court of appeals here," and that, under his position, "*Eilberg* was wrongly decided."

In addition, the District of Columbia Circuit's Speech or Debate decisions are uniquely important because virtually every public corruption investigation affecting the Legisla-

tive Branch takes place at least in part in our Nation's capital. Those investigations serve a vital role in protecting the integrity of our democratic government. Following the District of Columbia Circuit's denial of rehearing en banc in this case by a 5-4 vote (with one judge recused), see Pet. App. 73a-74a, only this Court can restore the proper constitutional balance to congressional corruption investigations in the seat of our Nation's government.

Moreover, the government must now weigh the need for evidence against the risk that courts will hold that investigations were tainted by the use of previously uncontroversial investigative techniques. Pet. 25-26. The court of appeals' decision is thus casting an immediate cloud over ongoing congressional corruption investigations. The absence of a more developed conflict of authority in the circuits therefore provides no reason to deny review in this case.

2. In seeking to avoid review, Representative Jefferson attempts various procedural objections to certiorari. Those contentions are directly contradicted by the record and provide no obstacle to review.

a. Representative Jefferson contends (Br. in Opp. 13-15 & n.8, 17) that the government forfeited its challenge by declining to defend the search in the court of appeals, and instead acquiescing in the court of appeals' remand order, which directed the district court to make ex parte, in camera privilege determinations. The government did no such thing. Rather, as the court of appeals explained, the government argued on appeal "that the special procedures described in the warrant affidavit 'are more than sufficient to protect Rep[resentative] Jefferson's rights . . . under the [Speech or Debate] Clause.'" Pet. App. 10a (quoting Gov't C.A. Br. 15-16); see, *e.g.*, Gov't C.A. Br. 15-16, 21. Moreover, the court of appeals squarely rejected that contention. See, *e.g.*, Pet. App. 16a ("The special procedures

outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege before their compelled disclosure to Executive agents."). Claims are properly presented in this Court if they were either pressed *or* passed upon below. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Here, the government's claim was pressed *and* passed upon in the court of appeals.

To be sure, the government *also* argued that, *"[e]ven if* the procedures proposed by the Government were constitutionally insufficient, that would not invalidate the search, which would be fully constitutional under the additional procedures required by this Court's remand order." Gov't C.A. Br. 32 (emphasis added). And the government submitted that the court could reject Representative Jefferson's Speech or Debate claim on the premise that those procedures would remain in place. *Id.* at 15, 35. But that argument hardly forfeited the broader arguments that were both pressed and passed upon—adversely to the government—below. And the months that have elapsed since the court of appeals briefing in which *no* privilege determinations have been made refute the court of appeals' assumption that the remand order provided a "streamlined" solution. Pet. App. 17a.

b. Nor is there merit to Representative Jefferson's contention (Br. in Opp. 12-17) that the petition seeks an advisory opinion because the court of appeals' remand order granted the government all of the relief it sought. To the contrary, the remand order itself severely disadvantages the government and denies it procedural rights that it enjoyed under the district court's judgment.

As explained in the petition for a writ of certiorari (Pet. 21-23 & n.4), the remand order, coupled with Representa-

tive Jefferson's broad claims of privilege, requires the district court to make thousands of ex parte, in camera privilege determinations without the benefit of informed advice from the government, which is in the best position to brief privilege issues in the context of the ongoing criminal investigation. While the government filed a legal memorandum in the district court concerning the general standards applicable to Speech or Debate claims, the government could not provide any analysis of the specific materials and could not dispute Representative Jefferson's ex parte, fact-specific claims. The result is that, a year and a half later, the district court still has not announced *any* privilege determinations concerning *any* of the thousands of documents over which Representative Jefferson has claimed privilege.

Even when the district court eventually makes its determinations, the government may not be able to take a meaningful appeal of any adverse determinations, short of simply asking the court of appeals to review the district court's ex parte, in camera decisions. Similarly, if Representative Jefferson appeals any of the district court's determinations, the court of appeals will likely be thrust into a role similar to that of the district court, considering one-sided, and presumably fact-bound, privilege claims.

Representative Jefferson's assertion (*e.g.*, Br. in Opp. 2) that the remand order permits the government to secure all the documents it seeks is, therefore, wholly unrealistic. In contrast, reversal of the court of appeals' decision would enable the government not only to provide informed adversarial briefing, but also to concede privilege where appropriate and to waive any dispute over documents the government considers irrelevant, duplicative, or otherwise not essential—thereby narrowing the lower courts' daunting task and expediting this considerably delayed investigation.

c. While he does not dispute that this case presents a live controversy for this Court's review, Representative Jefferson suggests (Br. in Opp. 15-16) that certiorari is not warranted because the resolution of this dispute will have no practical effect on the government's investigation. Because the search warrant proceedings have already engendered significant delay, the government will not seek further delay of Representative Jefferson's trial in hopes of receiving further documents from the search. Pet. 10-11. But two weeks ago, on February 20, 2008, Representative Jefferson filed an interlocutory appeal in the Fourth Circuit from the trial court's denial of his motion to dismiss the indictment. Notice of Appeal, *United States* v. *Jefferson*, No. 1:07-cr-00209 (E.D. Va.). Thus, at this point, there may be time for the government to receive further documents before Representative Jefferson's trial.[1]

In any event, as explained in the petition for a writ of certiorari (Pet. 10-11), the seized evidence is relevant to the government's ongoing investigation of other participants in Representative Jefferson's numerous alleged bribery schemes. The search warrant affidavit established probable cause to believe that Representative Jefferson was but one participant in several bribery schemes involving a vari-

[1] Representative Jefferson is arguing on appeal that "material protected by * * * the Speech or Debate Clause * * * was [improperly] presented to the grand jury." Notice of Appeal at 1, *Jefferson*, *supra* (No. 1:07-cr-00209). In the government's view, Representative Jefferson's appeal lacks merit. If Representative Jefferson were to prevail on appeal, however, the government would have an interest in securing additional, non-privileged evidence from the search of his office for purposes of a new indictment. The Fourth Circuit appeal provides no basis for denying review in this case because, even if the government prevails, the Fourth Circuit can do nothing about the District of Columbia Circuit's erroneous decision in this case and its practical impact on criminal investigations in the seat of our Nation's government.

ety of other participants, and that evidence of that criminal activity would be found in Representative Jefferson's congressional office. See C.A. App. 11-75. Thus, this dispute between the government and the congressional office of Representative Jefferson will remain live even after the conclusion of the criminal trial of Representative Jefferson himself.

3. There is no reason to postpone review, as amici suggest, in the hopes of an inter-Branch compromise. Discussions for that purpose began almost two years ago, at the direct behest of the President (C.A. App. 249-250) and House leadership (Amici Br. Add. B at 4a). Those discussions have not been productive, however, in part because of the court of appeals' decision. Counsel for the House of Representatives has asserted that the court of appeals' recognition of a non-disclosure privilege follows "well-established precedents" and that any other view of the Clause would "radically shrink" or "effectively gut" the Clause's protections.[2] As a result, this Court's review of the court of appeals' decision would not *interfere* with ongoing negotiations; it would instead clarify their starting point. If the court of appeals' decision is flawed, as the government believes, reversal would correct House Counsel's contrary view and facilitate a more realistic compromise.

4. The bulk of Representative Jefferson's response focuses on the merits. That discussion underscores that the important constitutional question presented is squarely joined by the parties and warrants review by this Court.

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[2] Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington 4 (Feb. 13, 2008) <http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf>; see Amici Br. 11.

Indeed, Representative Jefferson's brief makes clear that he seeks an expansion of the Speech or Debate Clause that neither this Court nor any other court of appeals has ever sanctioned. He does not seek protection against prosecution for legislative acts, the use of legislative acts against him, or compelled testimony about legislative acts. Instead, he broadly asserts (Br. in Opp. 20) that the Speech or Debate Clause also contains an absolute confidentiality component.

As explained in the petition (Pet. 17), the absolute nondisclosure protection sought by Congressman Jefferson and granted by the court of appeals far exceeds the textual scope of the Clause, which is limited to "Speech or Debate in either House." U.S. Const. Art. I, § 6, Cl. 1. While this Court has construed the Clause more broadly than its text would suggest "when *necessary* to prevent indirect impairment of [legislative] deliberations," *Gravel* v. *United States*, 408 U.S. 606, 625 (1972) (emphasis added; citation omitted); see Pet. 13-14, there is no such necessity here. The Executive seeks only unprivileged evidence of criminal conduct, and it would come into only cursory contact with any privileged materials in the course of searching for unprivileged ones. Pet. 17-18.

Representative Jefferson asserts (Br. in Opp. 23) that a broad "non-disclosure privilege" is needed to protect legislators from "politically motivated investigation[s]." There are, however, numerous other safeguards that protect against that remote risk. A neutral magistrate must issue a search warrant (or wiretap authorization) upon a finding of probable cause. The Fourth Amendment's reasonableness requirement further ensures that any warrant will be executed in a reasonable manner. See U.S. Const. Amend. IV. Rule 6(e) of the Federal Rules of Criminal Procedure also prohibits the government from disclosing matters oc-

curring before a grand jury. In this case, moreover, the warrant expressly called for filter teams with no other role in the investigation to sort responsive unprivileged materials from other materials, and to provide only the responsive unprivileged materials to the prosecution team. Pet. App. 4a-5a. The warrant further prohibited disclosure by the filter team of "any politically sensitive items inadvertently seen." C.A. App. 80. And, as this Court has explained, "[t]he Legislative Branch is not without [political] weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." *Brewster*, 408 U.S. at 522-523 n.16.

Representative Jefferson's contention (Br. in Opp. 21) that his position is nonetheless necessary to prevent a chilling effect on deliberations is refuted by this Court's rejection of similar arguments advanced by the President of the United States, see *United States* v. *Nixon*, 418 U.S. 683, 712 (1974), and state legislators, see *United States* v. *Gillock*, 445 U.S. 360 (1980) (citing *Nixon*, *supra*). See Pet. 18. While the Speech or Debate Clause is absolute *where it applies*, the very issue at stake in this case is its scope. The court of appeals has greatly expanded its scope beyond what has been recognized in the past and what can be justified. Its decision divided the panel, ultimately split the court of appeals 5-4 (with one judge recused) on the government's petition for rehearing en banc, and now calls out for this Court's review.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

GREGORY G. GARRE*
Acting Solicitor General

MARCH 2008

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* The Solicitor General is recused from this case.